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No. 02-99

In The Supreme Court of the United States

ALBERTO VALDEZ,

Petitioner,

versus

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE THE CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

I. WHETHER 28 U.S.C. §2254(e)(1)'S PRESUMPTION OF CORRECTNESS SHOULD APPLY TO "FINDINGS" ADOPTED BY A STATE COURT JUDGE WHO LOST THE EXHIBITS INTRODUCED AT THE EVIDENTIARY HEARING, AND WAS ADMITTEDLY UNFAMILIAR WITH THE RECORD UPON WHICH THOSE "FINDINGS" WERE BASED.

II. WHETHER 28 U.S.C. §2254(d)'S LIMITATION ON HABEAS RELIEF SHOULD APPLY TO A STATE COURT "DECISION" DENYING RELIEF PREPARED BY THE STATE AND ADOPTED ALMOST *VERBATIM* BY A JUDGE WHO EXPRESSLY REFUSED TO REVIEW THE RECORD, AND LOST THE EXHIBITS ADMITTED AT THE STATE COURT EVIDENTIARY HEARING.

III. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT 28 U.S.C. §2254(d)'S LIMITATION ON RELIEF GOVERNS A FEDERAL DISTRICT COURT'S CONSIDERATION OF CLAIMS AS TO WHICH THE DISTRICT COURT PROPERLY HELD AN EVIDENTIARY HEARING AND TOOK EVIDENCE NOT CONSIDERED BY THE STATE HABEAS COURT.

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[1] While the formulation of the Questions Presented herein differs from those set forth in the Petition for a Writ of Certiorari, this difference is simply a function of *amicus*' focus on the Fifth Circuit panel majority's treatment of the important habeas corpus issues contained in this case. Viewed in that light, *amicus* believes that the formulation of the Questions Presented in this brief is entirely consistent with the contents of the Petition for a Writ of Certiorari.

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INTEREST OF *AMICUS CURIAE*

The Cornell Death Penalty Project is an undertaking of the Cornell Law School. One of the Project's primary goals is to address questions of law that carry important implications beyond the facts of any particular case and that involve the basic fairness of the death penalty's administration. In keeping with this objective, the Project is attentive to developments in the law of federal habeas corpus, and maintains a strong interest in seeking to ensure that prisoners under sentence of death are afforded access to meaningful review of their claims for relief. The Project accordingly seeks to intervene as *amicus curiae* in selected cases presenting important questions of law which implicate these interests.

INTRODUCTION

Amicus curiae submits this brief pursuant to Supreme Court Rule 37.2 in support of Alberto Valdez' Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.[2] In the view of *amicus*, this case presents no fewer than three significant and recurring issues arising out of 28 U.S.C. §§2254(d) and (e), as amended by the AEDPA. As this Court recently observed, the AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas

[2] Pursuant to Rule 37.6, *amicus* certifies that this brief was authored entirely by counsel for *amicus*. No persons or entities other than *amicus* made monetary contributions to the preparation or submission of this brief.

'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Cone v. Bell*, 122 S.Ct. 1843, 1849 (2002). In this case, the question is not whether a responsibly wrought state court decision was denied its due under this new regime. Rather, it is whether the AEDPA's mechanisms for preventing "federal habeas 'retrials'" and ensuring respect for the work of state courts should apply to cases at the opposite end of the spectrum: those in which the state court's disposition of a death-sentenced prisoner's claim was arrived at through a procedure devoid of concern for accuracy or fairness.

A majority of the Fifth Circuit panel in petitioner's case resolved this question in a manner that marks a dramatic turn away from principles of fairness and safeguarding the integrity of judicial proceedings, and a move toward truly "rubber stamp" review, in which literally anything bearing the mark of a state judicial officer is automatically entitled to "deference," regardless of its content or its true origins. *Amicus* submits this brief because it does not believe the AEDPA requires, or even authorizes, such meaningless review, and because, without this Court's intervention, the panel majority's opinion in petitioner's case is certain to adversely affect large numbers of prisoners whose constitutional claims will be obscured behind a curtain of deference, drawn not because those claims have already received a fair examination, but merely because they are referred to in a document bearing the signature of a state court judge.

REASONS THE WRIT SHOULD BE GRANTED

A. Application of 28 U.S.C. §2254(e)(1)'s presumption of correctness to "findings" adopted by a state court judge who was admittedly unfamiliar with the record, and who lost the exhibits introduced at the state court evidentiary hearing, is inappropriate.

The state habeas judge in this case, who did not preside over petitioner's trial, lost the exhibits introduced in support of petitioner's claims for relief, and openly acknowledged that he "'had never read the record of the trial'" at any time before adopting the state's proposed findings and denying relief. *Valdez v. Cockrell*, 274 F.3d 941, 944 (5th Cir. 2001) (internal citation omitted).[3] In the ensuing federal habeas proceedings, the district court recognized that "[a] few of these findings were specific and apparently were not tainted by the fact that the state habeas judge had effectively excluded . . . some of the most critical evidence." *Valdez*, 93 F.Supp.2d at 777-778. As to those "few" findings, the district court applied §2254(e)(1)'s presumption of correctness. *Id.* With regard to the state court's "more general conclusions" concerning the effectiveness of petitioner's trial counsel, however, the district court declined to apply §2254(e)(1) on the ground that those conclusions were not the product of a full and fair state court hearing. *See id.*

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[3] *See also Valdez v. Johnson*, 93 F.Supp.2d 769, 776 (S.D.Tex. 1999) ("At a hearing on the petition, the state habeas judge stated 'I have never read the record of the trial and I don't intend to. I don't have the time'").

On the state's appeal of the district court's order granting sentencing phase relief, the Fifth Circuit panel majority rejected the district court's approach to §2254(e)(1), holding that "a full and fair hearing is not a precondition to according §2254(e)(1)'s presumption of correctness to state habeas court findings of fact. . . . " *Valdez*, 274 F.3d at 949. As the dissenting member of the panel, and the four circuit judges who dissented from the denial of rehearing *en banc* recognized, the panel majority's holding fails to heed this Court's longstanding pronouncements concerning the effect of state court factual determinations in federal habeas cases, and poses a genuine threat to the fairness of habeas proceedings in the Fifth Circuit, and elsewhere.

Nearly forty years ago, this Court observed that,

> because detention . . . obtained [in violation of the Constitution] is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. . . . It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.

Townsend v. Sain, 372 U.S. 293, 312 (1963) (citing *Frank v. Mangum*, 237 U.S. 309, 345-350 (1915) (dissenting opinion of Mr. Justice Holmes)). To be sure, the scope of the rule adopted by the Court in *Townsend* has been narrowed in the years since its announcement, both by Congress' codification of a presumption of correctness in 1966, and by this Court in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (requiring petitioners who negligently failed to develop the factual bases of their claims in state court proceedings to demonstrate "cause and prejudice" before

being entitled to a federal evidentiary hearing). What has never changed, however, is this Court's adherence to the fundamental principle that federal courts properly exercising habeas jurisdiction must not be blindly bound to a state court's factual determinations where the state court "has failed to afford a full and fair adjudication of the federal contentions raised . . . because in the particular case the remedy afforded by state law proves in practice . . . [to be] seriously inadequate." *Ex parte Hawk*, 321 U.S. 114, 118 (1944).[4]

The Fifth Circuit panel majority's decision in this case is a dramatic and unwarranted departure from the course this Court has followed for decades. Because *Townsend*'s recognition that "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues" is as at least as true today as it was in 1963, the panel majority's decision is also a uniquely dangerous one for habeas petitioners. The "procedure" out of which the state habeas court's "findings" rejecting petitioner's ineffective assistance of counsel claim emerged could not have been any less "full and fair." The state court judge simply signed off on the proposed findings submitted by petitioner's adversary – a party not lacking familiarity with the procedural advantages to be

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[4] *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (even after AEDPA, "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights. . . . Congress [has] expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights . . . "); *see also Engle v. Isaac*, 456 U.S. 107, 126 (1982) ("[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence" and stands as "a bulwark against convictions that violate 'fundamental fairness' ").

gained by securing judicial adoption of one-sided factual determinations[5] – and did so after unabashedly declaring that he had not read, and did not intend to read, the trial record, and that he had lost the evidence submitted during the hearing seven years prior to entry of the judgment.[6]

The panel majority explained its conclusion that a federal court must presume factual findings produced via the procedure described above correct by stating that the AEDPA "jettisoned all references to a 'full and fair hearing' from the presumption of correctness," such that "reintroduc[tion] [of] a full and fair hearing requirement that would displace application of §2254(e)(1)'s presumption would have the untenable result of rendering the amendments enacted by Congress a nullity." *Valdez*, 274 F.3d at 949-950.[7] Stated more directly, the panel majority believed

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[5] *See Rudenko v. Costello*, 286 F.3d 51, 75 (2nd Cir. 2002) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)) (recognizing "the 'potential for overreaching and exaggeration on the part of attorneys,' frequently exhibited when they are preparing findings of fact after learning that the judge has decided in their favor").

[6] Under this approach, it would have been impossible for the state habeas court to perform the analysis of petitioner's ineffective assistance of counsel claim mandated by this Court's jurisprudence, since that analysis relies in large part upon a review of the trial record, as well as the evidence presented in post-conviction proceedings. *See (Terry) Williams v. Taylor*, 529 U.S. 362, 398-399 (2000); *see also Dobbs v. Zant*, 506 U.S. 357, 358 (1993) ("We have emphasized before the importance of reviewing capital sentences on a complete record").

[7] *See also id.* ("Valdez would have us ignore the fact that Congress has excised this prerequisite from §2254's presumption of correctness . . . "); *id.* at 951 n.17 ("We cannot . . . second guess the intent of Congress in this manner"; "Congress's omission of language of a full and fair hearing is clear").

that, because Congress did not expressly retain subdivisions (1) through (8) of the former §2254(d) when it moved the presumption of correctness to §2254(e)(1), the conditions enumerated in those subdivisions were silently stricken from habeas practice. As Judge Dennis persuasively explained in his dissent from the panel's opinion, this need not – and certainly should not – be the case. *See Valdez*, 274 F.3d at 965-968.

In addition to the arguments set forth in Judge Dennis' dissent, with which *amicus* concurs, there are other reasons not to interpret Congress' revision of §2254(e)(1) as having accomplished the sweeping change attributed to it by the panel majority. First, Congress undoubtedly approached the formulation of the AEDPA, including §2254(e)(1), with a presumption of regularity. At the very least, it is unsafe to assume that Congress envisioned cases like petitioner's, in which the state court's role in making factual findings was essentially limited to signing a document prepared by a party to the proceeding without so much as reading the record. That Congress worked under such a presumption finds support in §2254(d), which closely circumscribes a federal court's authority to grant habeas relief, but permits such relief to be granted where the state court's rejection of a petitioner's claim was not objectively reasonable. *See Williams*, 529 U.S. at 409. Nothing in the text or history of the AEDPA suggests that this reasonableness baseline should not extend to §2254(e)(1)'s presumption of correctness.

Second, it is entirely possible that the AEDPA's abbreviated version of the presumption of correctness is a product of simple omission: Congress revised nearly all of §2254, adding some entirely new subdivisions and

reassigning others, and it is entirely plausible that while Congress considered it important to retain the statutory presumption of correctness, less attention was paid to the particulars of the presumption's operation than was paid to some of the other, arguably more significant changes the AEDPA introduced. *Cf. Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("in a world of silk purses and pigs' ears, the Act is not a silk purse of statutory drafting").

Finally, to the extent that Congress' failure to expressly retain the language of the former §2254(d) may be read to suggest some relaxation of the preconditions to application of the presumption of correctness, this Court is both authorized and obligated to establish a "floor," below which state court factual findings may not enjoy statutory deference. As discussed above, the Court's historical concern for the integrity of the facts upon which a federal habeas court's decisions necessarily rest, *see Ex Parte Hawk*, *supra*, leaves no room for blind deference for factual findings arrived at through the sham procedure employed by the state habeas court in petitioner's case. Thus, at the very least, this Court should exercise its authority to reaffirm the longstanding principle that a federal court faced with state court factual determinations reached after something well short of a full and fair proceeding need not stay its hand with respect to "the resolution of contested factual issues." *Townsend*, 372 U.S. at 312. *Cf. Horn v. Banks*, 122 S.Ct. 2147 (2002) (reaffirming applicability of *Teague v. Lane*, 489 U.S. 288 (1989) nonretroactivity doctrine in post-AEDPA cases, notwithstanding §2254(d)(1)'s "clearly established" clause); *Carey v. Saffold*, 122 S.Ct. 2134, 2138 (2002) (interpreting 28 U.S.C. §2244(d)(2) in light of longstanding concerns for comity and full exhaustion of state remedies); *Duncan v.*

Walker, 533 U.S. 167, 178 (2001) (similar); *Sanders v. United States*, 373 U.S. 1, 12-17 (1963) (federal habeas court must adjudicate successive claim brought via §2255 when "ends of justice" so require, even though language of §2255 contains no requirement that it do so).

B. The limitation on relief in 28 U.S.C. §2254(d) should not apply to a state court "decision" prepared by the state and adopted nearly *verbatim* by a judge who fails to discharge his obligation to independently adjudicate a prisoner's constitutional claims.

The panel majority's holding that state proceedings need not be full or fair before the AEDPA's provisions may be applied encompassed not only §2254(e)(1), but also §2254(d). *See Valdez*, 274 F.3d at 951 ("we hold that a full and fair hearing is not a precondition . . . to applying §2254(d)'s standards of review"). As the dissents from the panel opinion and from the denial of rehearing *en banc* persuasively explain, this holding runs contrary to fundamental fairness, and to the comity concerns underlying the AEDPA.

The function of the limitation on relief mechanism established by §2254(d) is to advance the interests of comity by shifting the primary obligation for adjudicating claims of constitutional error to the state courts. *Cf. Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) ("application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum"). In return for

shouldering this burden, §2254(d) promises state judges who responsibly discharge their obligation to adjudicate constitutional claims that their decisions will be respected – that is, that a decision denying relief will not be disturbed by a federal court unless that decision was contrary to, or involved an unreasonable application of federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. §2254(d)(1) and (2).

Where, as in this case, a state court plainly abdicates its obligation to responsibly examine and decide a petitioner's constitutional claims, however, application of the heightened respect embodied in §2254(d) leads to perverse results. *Cf.* (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 437 (2000) ("comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort"). By its plain terms, §2254(d) is applicable if, and only if, a petitioner's claim was "*adjudicated* on the merits," and that "adjudication" resulted in a "*decision*" by the state court. This choice of language indicates that Congress envisioned the increased respect for state court decisions embodied in §2254(d)'s limitation on relief as a two way street: if a state court takes its duty to protect federal constitutional rights seriously, then its decision should be treated with respect; however, if the state court abdicates that responsibility by permitting a party to the proceedings to act as both litigant and decision-maker,[8]

[8] If ever there has been a case of state-court abdication of adjudicatory responsibility, this case is it. The state habeas judge did not preside over petitioner's trial, and therefore had no independent

(Continued on following page)

then the availability of relief in subsequent federal habeas proceedings must not be encumbered by heightened respect for an indifferent state court judge.

Congress' use of different words to describe the requisite action taken by a state court ("adjudication") and the necessary result of that action ("decision") conveys important meaning. *See, e.g., Molzof v. United States*, 502 U.S. 301, 307 (1992) (Congress is presumed to know the meaning attached to the words it chooses); *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638, 645 (1990) ("basic principles of statutory construction ... require giving effect to the meaning and placement of words chosen by Congress"). An "adjudication" is a process whereby a judge receives and independently assesses factual and legal information from the litigants, considers the strengths and weaknesses of each side's positions, and formulates a judicial conclusion – a "decision" – reflecting the outcome of the judge's deliberations. *See* Black's Law Dictionary 39 (4th ed. 1979). Thus, what is embodied in the terms "adjudication" and "decision," and what is therefore manifested through Congress' selection of these words, is an expectation that state courts themselves will be meaningfully involved in the activity of moving from presentation of evidence, to evaluation of evidence, to application of law to facts, and finally to formulation of conclusions

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knowledge of the proceeding in which petitioner was convicted and sentenced to death. Notwithstanding this lack of familiarity with the facts and record of the case, the state habeas judge adopted the respondent's proposed findings without even reading the record, and without considering the exhibits, which the court had lost at some point during the nearly seven year interval between the state habeas evidentiary hearing and the denial of relief.

based upon what has transpired. *See* C. Wright & A. Miller, Federal Practice and Procedure §2578 (2d ed. 1995) ("All courts agree that finding the facts is an important part of the judicial function and that the judge cannot surrender this function to counsel").

That Congress chose these words and, more importantly, the meanings they carry, is not surprising. For §2254(d)'s limitation on relief to be constitutionally justifiable, it must be evident both from the state court's decision (the end result) as well as from the adjudication of the claims (the process out of which the result emerged) that it is the product of fair, full, and meaningful judicial consideration. Only by building this requirement into the mechanism triggering the applicability of §2254(d) could Congress be assured that federal courts will not be reduced to mindlessly rubber-stamping state court denials of relief without regard for the circumstances surrounding the state court's action. *Cf. Ward v. Trent*, 19 F.Supp.2d 608, 612 (S.D.W.Va. 1998) (expressing disapproval of reduction of federal habeas court's role "to the level of a rubber stamp that must dismiss a habeas petition unless the state court's findings stretch beyond the reason of any reasonable jurist").

The findings and conclusions prepared by the respondent in this case, and adopted by the state habeas court, bear none of the characteristics of a fair or responsible adjudication of the merits of petitioner's claims. In fact, the available information indicates that the state habeas court's involvement in the process of rendering findings and entering judgment was confined to little more than placing a signature on a document crafted by a partisan litigant. *See Rudenko v. Costello*, 286 F.3d 51, 75 (2nd Cir. 2002) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 572

(1985)) (recognizing "the 'potential for overreaching and exaggeration on the part of attorneys,' frequently exhibited when they are preparing findings of fact after learning that the judge has decided in their favor"). Under these circumstances, there is simply nothing about the state court's disposition that is worthy of the heightened respect contemplated by §2254(d); on the contrary, the state court's handling of petitioner's claims – especially when viewed in the light of the district court's subsequent determination that petitioner's Sixth Amendment right to effective assistance of counsel had been violated – demonstrates conclusively that the state court did not conscientiously discharge its obligation to adjudicate petitioner's claims.[9]

Amicus submits that forcing federal courts to apply §2254(d)'s limitation on the power to grant habeas relief in cases as egregiously mishandled as this one is inconsistent with comity principles underlying that provision's adoption, and with the principles of fundamental fairness and equity which have always informed this Court's habeas decisions. *See Fay v. Noia*, 372 U.S. 391, 438 (1963) ("habeas corpus has traditionally been regarded as governed by equitable principles"); *see also, e.g., Schlup v. Delo*, 513 U.S. 298, 320 (1995) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)) ("We firmly established the importance of the equitable inquiry required by the ends of justice in 'a trio of 1986 decisions' handed down on the same day")

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[9] *See Rudenko*, 286 F.3d at 76 ("the district court's adoptions of the State's memorandum of law in their entirety, without any indication of which argument or arguments the court found persuasive as to any given claim . . . provide virtually no assistance to this Court in the performance of our reviewing function").

(referring to *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Murray v. Carrier*, 477 U.S. 478 (1986); *Smith v. Murray*, 477 U.S. 527 (1986)). For these reasons, this Court should grant certiorari, and make clear that §2254(d) does not require federal courts to talismanically uphold "rubber stamp" denials of relief like the one entered by the state habeas court in petitioner's case.

C. The limitation on relief set forth at 28 U.S.C. §2254(d) should not govern a federal district court's consideration of claims as to which the district court properly holds an evidentiary hearing and takes evidence not considered by the state habeas court.

In addition to requiring application of §2254(d) and §2254(e)(1) notwithstanding the absence of any indicia that a petitioner's state court proceedings were full or fair, the panel majority's opinion also declared that §2254(d)(1) and (2) apply even where a district court properly holds an evidentiary hearing at which new evidence relevant to a petitioner's claims is introduced. The majority stated, without elaboration, as follows:

> Where a district court elects, in instances not barred by §2254(e)(2), to hold an evidentiary hearing, the hearing may assist the district court in ascertaining whether the state court reached an unreasonable determination under either §2254(d)(1) or (d)(2). An evidentiary hearing is not an exercise in futility just because §§2254(d) and (e)(1) require deference.

Valdez, 274 F.3d at 952. These declarations ignore serious – indeed insurmountable – problems of implementation, and in so doing, arrive at a result which is clearly wrong.

Neither §2254(d)(1) or (d)(2) can sensibly be applied when a district court takes new evidence relevant to a petitioner's claim for relief.[10] First, as this Court's decisions in (*Terry*) *Williams* and *Cone* make clear, §2254(d)(1)'s "contrary to" clause is concerned with choice-of-law issues, and with the state court's failure to resolve a "materially indistinguishable" claim in the manner chosen by this Court in a previous case. *See Williams*, 529 U.S. at 405; *Cone*, 122 S.Ct. at 1850. Neither of these inquiries is meaningfully informed by evidence the state court did not have, since the state court's "adjudication" of the petitioner's claim could not have been influenced by such evidence.

Similarly, §2254(d)(1)'s "unreasonable application" clause is functionally confined to an examination of the evidence and law that were before the state court. *See Williams*, 529 U.S. at 407 ("Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case"). Here again, a state court simply could not have applied the law to facts it was not actually considering, and the state court could not have been considering facts whose presentation did not occur until the petitioner's federal habeas proceedings.

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[10] In this case, the evidence petitioner presented during the federal evidentiary hearing was virtually identical to that presented during the state habeas hearing. The respondent, however, presented additional evidence not offered during the state court proceeding.

The inapplicability of §2254(d)'s limitation-on-relief mechanism to claims for which additional evidence is taken in a federal evidentiary hearing is even better illustrated by subdivision (d)(2), which is expressly concerned only with the reasonableness of a state court's factual determinations "in light of the evidence presented in the State court proceeding." Nothing about the inquiry mandated by §2254(d)(2) calls for, or allows room for, consideration of evidence presented for the first time in federal habeas proceedings. Indeed, it would be impossible to abide by subdivision (d)(2)'s express limitation while simultaneously considering evidence properly presented in a federal evidentiary hearing.

More fundamentally, apart from the impossibility of correctly applying §2254(d) to claims whose evidentiary basis has been expanded (or laid down for the first time) in federal habeas proceedings, application of that provision in these circumstances would make no sense. When a federal district court determines that an evidentiary hearing is appropriate, it has necessarily determined (a) that the facts to be developed at the hearing will, at the very least, assist the court in accurately adjudicating the petitioner's constitutional claim, *see Townsend*, *supra*, and (b) that the absence from the state court record of the facts necessary to resolve that claim is not attributable to the petitioner or his counsel, *see* §2254(e)(2).[11] The panel majority's declaration notwithstanding, to permit fact development in these

[11] It bears emphasis that, in this case, the respondent did not challenge the correctness of the district court's decision to hold an evidentiary hearing on petitioner's allegations. *See Valdez*, 274 F.2d at 948.

circumstances, but then require the district court to confine its analysis to the parameters outlined in §2254(d)(1) and (2) – which, as discussed above, provide no means of accounting for evidence that was not considered by the state court – is "an exercise in futility." *Valdez*, 274 F.3d at 952. For this reason as well, *amicus* submits that this Court should grant the writ of certiorari and correct the panel majority's misconceptions about the applicability and operation of §2254(d).

CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should grant Alberto Valdez' petition for a writ of certiorari.

Respectfully submitted,

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